SUPREME COURT U. S.

FILED
JUN 4 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1281

MISSISSIPPI VALLEY PORTLAND CEMENT COMPANY,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

CHARLES CLARK
1741 Deposit Guaranty Bank Bldg.
Jackson, Mississippi
VARDAMAN S. DUNN
1741 Deposit Guaranty Bank Bldg.
Jackson, Mississippi
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

TABLE OF CASES

Burnet v. *Commonwealth Imp. Co.* (1932), 287 U.S. 415, 53 S.Ct. 198, 77 L.Ed. 399 2

Commissioner v. *P. G. Lake, Inc.* (1958), 356 U.S. 260, 78 S.Ct. 691, 2 L.Ed.2d 43 ..... 2, 4

Dixie Electric Power Ass'n v. *Hosey* (Miss. 1968), 208 So.2d 751 4

Helvering v. *Horst* (1940), 311 U.S. 112, 61 S.Ct. 144, 85 L.Ed. 75 ..... 2, 4

Lucas v. *Earl* (1930), 281 U.S. 111, 50 S.Ct. 241, 74 L.Ed. 731 ..... 2, 3, 4

Moline Properties v. *C.I.R.* (1943), 319 U.S. 436, 63 S.Ct. 1132, 87 L.Ed. 1499 2

National Carbide Corp. v. *C.I.R.* (1949), 336 U.S. 442, 69 S.Ct. 726, 93 L.Ed. 779 2

United States v. *Rochelle* (C.A. 5, 1967), 384 F.2d 748 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1281

MISSISSIPPI VALLEY PORTLAND CEMENT COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent abandons the "sham" argument on which the Court of Appeals relied. This brings us back to the fundamental underlying fact that the corporation in this case had no "*economic benefit*" accruing to it, and this, we submit, is the controlling factor in determining whether a gain is "income".

By its charter, its by-laws and its corporate resolutions, Taxpayer was divested of all control over net margins, and it never became the owner thereof. It received

no "economic benefit" because its temporary physical possession of the funds was offset by the corresponding obligation to pass the funds on to its stockholders.

Is this result changed by such cited cases as *Moline Properties* v. *C.I.R.* (1943), 319 U.S. 436, 63 S.Ct. 1132, 87 L.Ed. 1499; *National Carbide Corp.* v. *C.I.R.* (1949), 336 U.S. 442, 69 S.Ct. 726, 93 L.Ed. 779; *Lucas* v. *Earl* (1930), 281 U.S. 111, 50 S.Ct. 241, 74 L.Ed. 731; *Burnet* v. *Commonwealth Imp. Co.* (1932), 287 U.S. 415, 53 S.Ct. 198, 77 L.Ed. 399; *Commissioner* v. *P. G. Lake, Inc.* (1958), 356 U.S. 260, 78 S.Ct. 691, 2 L.Ed.2d 43, and *Helvering* v. *Horst* (1940), 311 U.S. 112, 61 S.Ct. 144, 85 L.Ed. 75?

These cases are readily distinguishable:

The case of *Moline Properties* v. *C.I.R.* (1943), 319 U.S. 436, 63 S.Ct. 1132, 87 L.Ed. 1499, involved a corporation organized and owned exclusively by a single stockholder. The question at issue was whether the stockholder could disregard the corporate entity for tax purposes when it suited his purpose. One argument was that the corporation was the agent of its sole stockholder. The Court held that the existence of exclusive control relationship did not of itself create the relationship of agency, saying:

> ". . . Surely the mere fact of the existence of a corporation with one or several stockholders, regardless of the corporation's business activities, does not make the corporation the agent of its stockholders. Therefore the question of agency or not depends upon the same legal issues as does the question of identity previously discussed. . . ." (63 S.Ct. at 1135).

Much along the same line is the cited case *National Carbide Corp.* v. *C.I.R.* (1949), 336 U.S. 442, 69 S.Ct. 726, 93 L.Ed. 779, which applies the same rule to a wholly owned subsidiary corporation. As stated in this case:

> ". . . The entire earnings of petitioners, except for trifling amounts, are turned over to Airco not because the latter could command this income if petitioners were owned by third persons, but because it owns, and completely dominates the subsidiaries. . . ." (69 S.Ct. at 734).

In other words, the precedent binding obligation to make the distributions is not, in these cases, realistically present, since the sole stockholder, in the one case, and the parent corporation, in the other case, has 100% control and can turn the entire "obligation" on and off at any time at will.

These cases simply are holding that the principal-agency relation is not created merely by sole ownership and control of the corporate entity (by a single stockholder or parent corporation), and no intimation is found therein that a corporation may not by contract or the equivalent, as by charter provision, occupy the position of an agent in relation to the production and sale of a product such as that in the case at bar.

Lucas v. *Earl* (1930), 281 U.S. 111, 50 S.Ct. 241, 74 L.Ed. 731, is cited to the proposition that "Anticipatory assignments of earnings" have been struck down by the Courts. This case involved an assignment by an attorney to his wife of an interest in his future salary and attorney's fees. This case pointed to the statute which imposes a tax upon every individual, including "income derived from salaries, wages or compensation for personal services." The Court held that the case "turns on the import and reasonable construction of the taxing act" and that salaries and wages and income from personal services could not thus be so assigned as to prevent the same from being the income of the earner.

To the same point is the cited case of *Helvering* v. *Horst* (1940), 311 U.S. 112, 61 S.Ct. 144, 85 L.Ed. 75, which involved an assignment by gift of future income in the form of interest coupons detached from bonds. Here, as in *Lucas* v. *Earl*, the "right to receive income" as such, was vested in the assignor and it therefore was held to have been realized by the assignor through the economic benefit derived from his appropriation thereof to the purpose desired.

Commissioner v. *P. G. Lake, Inc.* (1958), 356 U.S. 260, 78 S.Ct. 691, 2 L.Ed.2d 43, involved the act of a corporation in paying a debt to its President by the assignment of income to accrue under mineral interests. The Court held that the use of future income to pay a debt was a realization of such income by the assignor whose right thereto had already become vested in ownership.

These last three cases all involve income vested or necessarily to become vested, as of right, in the assignor. The distinction is that in the case at bar, the corporation never had a "right to receive income", as such, because the vesting of such right was forestalled by contractual obligations implicit in the charter of its creation from which it derives its very existence as an entity.

As expressly authorized by the charter, the Board of Directors allocated in advance all cement to its stockholders to be produced and delivered at cost.

Under Mississippi law, the charter of a corporation is its Constitution and amounts to a three-way contract binding upon the corporation, its stockholders and the State. *Dixie Electric Power Ass'n* v. *Hosey* (Miss. 1968), 208 So.2d 751.

Therefore, we submit that, since no right to income ever accrued, none was realized and there was not present

here the "economic benefit" to the corporate entity which is requisite to the consideration of gain as income. Cf. *United States* v. *Rochelle* (C.A. 5, 1967), 384 F.2d 748.

For the reasons stated, Petitioner submits that the Writ should be granted.

Respectfully submitted,

CHARLES CLARK
1741 Deposit Guaranty Bank Bldg.
Jackson, Mississippi
VARDAMAN S. DUNN
1741 Deposit Guaranty Bank Bldg.
Jackson, Mississippi
Attorneys for Petitioner